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No. 298

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

CLAUDE A. WERTZ, as Trustee in Bankruptcy of McFERSON & FOSTER COMPANY, Bankrupt,
Petitioner,

vs.

NATIONAL CITY BANK OF EVANSVILLE, INDIANA, a Corporation Under the National Banking Laws,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	Page
The opinions of the courts below	1
Statement of grounds on which jurisdiction of the Court is invoked	2
Statement of the case	2
Specification of assigned errors as are intended to be urged	6
Summary of argument	6
Argument	8
Questions presented	8
First proposition	8
Second proposition	9
Third proposition	12
Reasons relied on for allowance of the writ	13
First reason	13
Second reason	16
Third reason	16
Conclusion	17

Cases Cited.

Bank of Calif. v. Brainard, 3 Fed. (2d) 3 (C. C. A. 9th) 10

Bank of Commerce & Trusts v. Hatcher, 50 Fed. (2d) 719 (C. C. A. 4th) 7, 13

Callaway v. West Palm Beach Atlantic National Bank, 69 F. (2d) 224 (C. C. A. 6th) 15

Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co., 229 U. S. 435 12

First Wisconsin National Bank of Milwaukee v. Charness, 73 F. (2d) 730 (C. C. A. 7th) 15

Forsyth v. Hammond, 166 U. S. 506, 17 S. Ct. R. 665, 41 L. Ed. 1005 10

Frankfort Trust Co. v. Comber, 68 F. (2d) 471 (C. C. A. 3d) 15

General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175 ..... 2, 12
German-American State Bank v. Larimer, 235 Fed. 501 (C. C. A. 8th) 10
Houston Oil Company of Texas v. Goodrich, 245 U. S. 440 10
In re Evansville Broom Company, 29 Fed. (2d) 643 .. 5
In re Tax Service Association of Illinois, 305 U. S. 160 ..... 11, 12
Kaufman v. Tredway, 195 U. S. 271 9
Magnum Import Co. v. Coty, 262 U. S. 159 16
New York County National Bank v. Massey, 192 U. S. 138 12
Page v. Arkansas Natural Gas Corporation, 286 U. S. 269 11
Rupp v. Commerce Guardian Trust & Savings Bank, 32 F. (2d) 234 (C. C. A. 6th) 14
Steedley v. Boylston National Bank, 229 U. S. 523 12
Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548 12
Twentieth Street Bank v. Gilmore, 71 F. (2d) 594 (C. C. A. 4th) 15
United States v. Johnston, 268 U. S. 230 10

Statutes Cited.

Bankruptcy Act, Secs. 68 (a) and 68 (b) 12
Rule 10, paragraph 3, 28 U. S. C. A., following Sec. 354 6
Rule 27, paragraph 2 (e), 28 U. S. C. A., following Sec. 354 6
Rule 38, paragraph 2, 28 U. S. C. A. 2
Rule 38, paragraph 5 (b), 28 U. S. C. A., following Sec. 354 ..... 16, 17

Textbook Cited.

8 Hughes Federal Practice, p. 540 13

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BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The trial court did not write an opinion. Its findings of fact and conclusions of law appear in the record (R. 150-154). The judgment of the trial court appears in the record (R. 155).

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit has not yet been published in the official report. It is set out in the record (R. 174-180).

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED.

Petitioner's petition for review on writ of certiorari does not contain "A statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question"; such omission in this respect violates the requirement of **Rule 38, paragraph 2, 28 U. S. C. A.**, following Section 354. The same paragraph of Rule 38 also provides: "A failure to comply with these requirements will be a sufficient reason for denying the petition."

In Petitioner's brief in support of his petition for writ of certiorari, at page 5 thereof will be found several paragraphs under the heading, "Jurisdiction." The petition must be complete and sufficient within itself without reference to the supporting brief.

> General Talking Pictures Corp. v. Western Electric Co., Inc., et al., 304 U. S. 175.

If, however, it were permissible to refer to the brief for the purpose of supplying a deficiency in the petition, then it is submitted the statements contained in Petitioner's brief under the heading of "Jurisdiction" fall far short of setting out the basis upon which it is contended that this court has jurisdiction in the instant case.

STATEMENT OF THE CASE.

In his petition and under the heading: "Summary Statement of the Case," appearing at page 2, is an inadequate statement of certain facts involved in this case. The Petitioner undertakes to set out in his brief beginning at page 5 under the heading "Statement of Facts" the facts in this case. The facts embraced in the para-

graphs numbered 1 to 7, inclusive, are correctly stated in accordance with the stipulation of the parties in the trial court. The remaining facts are incorrectly stated. For this reason Respondent deems it necessary to set out such portion of the facts which in its judgment are material to the consideration of the questions sought to be presented.

The following facts rest on the concurrent findings of the trial court and the United States Circuit Court of Appeals for the Seventh Circuit:

A state court receiver was appointed for the debtor on February 18th, 1936. Prior to this time, Respondent had no reasonable cause to believe that the debtor was insolvent. Until December 25th, 1935, the debtor had made all payments on its merchandise accounts regularly and promptly as they became due and payable (R. 151 and R. 175).

During the period covered by the Petitioner's complaint, the debtor maintained a checking account with Respondent and made daily deposits therein in the ordinary and usual course of business, and such deposits were received by Respondent in the ordinary and usual course of business. Each alleged preferential payment was one of such deposits; each was subject to withdrawal by the debtor's check; and there were no limitations or restrictions on the debtor's right to issue checks on that account. In the ordinary and usual course the debtor issued checks against that account and the Respondent paid them. Each deposit and each withdrawal was a part of a running account between the debtor and Respondent, a series of mutual debits and credits. The account at times showed credit balances in favor of the debtor, but at most times showed overdrafts (R. 152 and R. 175).

At times during the period in controversy, the debtor assigned accounts receivable to the Respondent, but they were not effective as security because the debtor retained exclusive control of such accounts. During the time the debtor deposited in this account a total of $115,638.66, and there was withdrawn from such account by the debtor's checks a total of $111,954.64. During this period there was deposited $3,684.02 more than there was withdrawn, of which some $379.66 was a credit in favor of the debtor at the close of business on February 8th, 1936, which was the date of the last alleged preferential payment. This sum was paid to the debtor (R. 152 to 153 and R. 175).

At the beginning of business on October 29, 1935, which was the beginning of the four months period prior to the filing of the petition in bankruptcy, the debtor was indebted to the defendant, by reason of an overdraft in the checking account in the sum of $3,304.36 (R. 153 and R. 175).

Each withdrawal from the checking account after the Respondent had been preferred, if there was a preference, was a giving by the Respondent of further credit in good faith without security of any kind for property which then became a part of the estate of the debtor, and the amount of such new credits remaining unpaid at the time of the adjudication in bankruptcy, when set off against the amounts which would otherwise be recoverable from the Respondent, if there was a preference, equals the amount of the alleged preferences, except as to the amount of $3,304.36 (R. 153 and R. 176).

None of the deposits made by the debtor, including the alleged preferential payments, depleted its assets except as to the amount of $3,304.36. None of the deposits, including the alleged preferential payments, was made by

the debtor or received by the Respondent for the purpose of building up the deposits for the benefit of the Respondent or to enable the Respondent to exercise its right of set-off, or with a view to such use, and the alleged preferential payments, except the amount of $379.66, were applied by the Respondent under its right of set-off to the payment of the overdraft in the amount of $3,304.36 existing at the beginning of business on October 29, 1935. (R. 153-154 and R. 176).

None of the alleged preferential payments was in fact a preferential payment, or a payment of any kind, but that each was a deposit in the checking account, and that none of such deposits created a preference in favor of Respondent against the other creditors of the bankrupt, and that the Respondent did not believe or know, or have reasonable cause to believe or know, that any of such deposits were intended as a preference in its favor (R. 154 and R. 176).

Upon the foregoing facts, the courts concluded that the Respondent was entitled to a set-off, if there was a preference, under paragraph 8 of the Respondent's answer, pursuant to the provisions of Section 60 (c) of the Bankruptcy Act, relying upon **In re Evansville Broom Company, 29 Fed. (2d) 643** (R. 153 and R. 176); and also concluded that the Respondent was entitled to such set-off, if there was a preference, under paragraph 9 of its answer, pursuant to the provisions of 68 (a) and (b) of the Bankruptcy Act (R. 154 and R. 176); and further concluded that the Petitioner was not entitled to recover in his action and thereupon dismissed the action at the cost of the Petitioner (R. 154 and R. 176).

It is important to call to the Court's attention the fact that Petitioner, according to the reference at page 8 of his brief, relies for the facts set out in the brief upon

"Claim of Plaintiff" (R. 140-143) (Plaintiff below is the Petitioner herein) rather than upon the testimony as set out in the Record or the Findings of Fact of either the trial court or the reviewing court.

Attention is respectfully called to the fact that copy of what is presumed to be an exhibit is set out as pages 9 and 10 of Petitioner's brief. A search of the Record reveals no such exhibit to be therein contained. **Rule 10, Paragraph 3, 28 U. S. C. A., following Section 354.**

SPECIFICATION OF ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

In his brief in support of this petition herein the Petitioner has neither assigned errors which he intends to urge in support of his petition for a writ of certiorari, nor has he set out or specified in his said brief any matters or propositions in lieu of such assigned errors which would serve to identify and challenge the rulings upon which is grounded the ultimate decision of the matter involved. **Rule 27, Paragraph 2 (e), 28 U. S. C. A., following Section 354.**

SUMMARY OF ARGUMENT.

1. Propositions 1 and 2 under "Questions Presented" do not present a legal question, but each presents a question of fact.

2. Whether or not the Respondent had reasonable cause to believe that it was intended that a preference be given it is a question of fact.

3. Whether or not a deposit made by a bankrupt was in good faith in the usual course of business or a mere form of transferring the amount thereof to the bank to be

applied on the indebtedness of the bankrupt under such circumstances as to constitute it a voidable preference are questions of fact.

4. The Supreme Court of the United States will not grant a writ of certiorari for the purposes of reviewing the evidence and discussing specific facts.

5. In passing upon an application for a writ of certiorari,, the Supreme Court accepts the findings in which two courts concur.

6. This case is governed by the provisions of the Bankruptcy Act prior to the amendments of June 22, 1938.

7. Where deposits are not made by the bankrupt or received by a bank for the purpose of building up such deposit for the benefit of the bank or to enable it to exercise its right of set-off or with a view to such use the bank is entitled to set-off under the provisions of Section 68 (a) and 68 (b) of the Bankruptcy Act.

8. The opinion and judgment in the instant case is not in conflict with the opinion and decision in **Bank of Commerce & Trusts v. Hatcher, 50 Fed. (2d) 719 (C. C. A. 4th),** nor with the opinions and decisions of the other cases cited at p. 13 of Petitioner's brief.

9. The Court will not grant certiorari to Circuit Courts of Appeals merely to give the defeated party another hearing, but only to secure uniformity of decision between such courts or to bring up cases of importance which it is in the public interest to have decided by the court of last resort.

10. The banking practice involved is entirely of a private nature and not a public concern.

ARGUMENT.

QUESTIONS PRESENTED.

THE FIRST PROPOSITION under "Questions Presented" includes the following language:

> " . . . At the time the arrangement was made with the President of the defendant bank whereby the bankrupt secured money from time to time, etc. . . . ".

Obviously, the Petitioner seeks to have the court understand that an arrangement had been made with the President of the Respondent bank whereby and under which the debtor secured money. Such a fact was not found by either the trial court or the Circuit Court of Appeals. More than that, there is nothing in the record, other than what is contained in a document denominated "Claim of Plaintiff" (R. 140-143), showing or tending to show that any such arrangement was made with the Respondent or with its President.

Essentially and actually, this first proposition presents not a legal question but a question of fact. Apparently the Petitioner is saying that the Respondent was put on inquiry as to the solvency of the bankrupt at the time. Manifestly, the Petitioner is seeking to raise the question whether or not the Respondent believed or had reasonable cause to believe that by making the deposits, preferences in its behalf were thereby effected.

(It must be noted that the transactions involved in this case are governed by the provisions of the Bankruptcy Act prior to the amendments of June 22, 1938.)

If Petitioner intends to raise the question on the basis of whether or not Respondent knew or had reasonable grounds to know that the bankrupt was insolvent at the

time the deposits were made, or whether he seeks to raise the question as to whether or not the Respondent believed or had reasonable cause to believe that by making the deposits, preferences in its behalf were thereby effected, then in both instances, essentially and exclusively, a question of fact is raised. In **Kaufman v. Tredway, 195 U. S. 271**, the court said:

> "Whether the bankrupt was insolvent on August 4th, 1898, when he paid the money to his brother, the defendant, and whether the latter had reasonable cause to believe that it was intended thereby to give a preference, are questions of fact, determined by the verdict of the jury, and not open to review in this court." (Citing cases.)

To the same effect, and without exception, is a long and unbroken line of decisions of both the federal and state courts.

THE SECOND PROPOSITION set out under "Questions Presented" seeks to assume that the deposits were "the repayment of money from time to time by the bankrupt to the defendant (Respondent) bank". The assumption of such fact is entirely unwarranted. The concurrent findings of the trial court and the Circuit Court of Appeals are definitely and precisely to the effect that each such deposit was not a repayment, that it was made by the bankrupt and accepted by the Respondent bank as a deposit and from day to day was checked against by the bankrupt without restriction or limitation on the part of the Respondent, and the checks so made were honored and paid from day to day by the Respondent bank; all of which transactions were in the usual and ordinary course of business; that each deposit and each withdrawal was a part of a running account between the bankrupt and the Respondent bank—a series of mutual debits and credits.

Again, this second proposition seeks to assert not a question of law but a question of fact essentially and exclusively. Whether a deposit made by the bankrupt was in good faith in the usual course of business or whether it was a mere form or manner of transferring the amount thereof to the bank to be applied on the indebtedness of the bankrupt under such circumstances as to constitute the deposit a voidable preference are questions of fact to be determined by the court or jury trying the case.

German-American State Bank v. Larimer, 235 Fed. 501 (C. C. A. 8th);
Bank of Calif. v. Brainard, 3 Fed. (2d) 3 (C. C. A. 9th).

The Petitioner, having had questions of fact decided against his contention both by the trial court and the reviewing court, is now seeking a further review of the facts in the case by this court. The Supreme Court of the United States has consistently declined to do this. In **United States v. Johnston, 268 U. S. 230**, the rule is stated as follows:

> "We do not grant a certiorari to review evidence and discuss specific facts."

In **Houston Oil Company of Texas v. Goodrich, 245 U. S. 440**, the following language is used:

> "The propriety of submitting these matters depended essentially upon an appreciation of the evidence. Having heard it all, the trial court concluded there was not enough to support any one of petitioners' above-stated claims to warrant a finding in their favor, and the Circuit Court of Appeals reached the same result. **226 F. 434, 141 C. C. A. 264.**
>
> "The record discloses no sufficient reason within the rule long observed why we should review the judgment below. **Forsyth v. Hammond, 166 U. S. 506, 17 S. Ct. R. 665, 41 L. Ed. 1005.**"

In **Page v. Arkansas Natural Gas Corporation, 286 U. S. 269**, the rule is stated as follows:

> "Many and complicated questions of fact are involved and were argued here, but, as they have been found in favor of the respondent by both courts below, we do not review them (see **Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034**), and we confine ourselves to the question of the jurisdiction of the referee in bankruptcy."

To the same effect is the decision of **In re Tax Service Association of Illinois, 305 U. S. 160.**

The facts as specially found in this case by the trial court were in their entirety concurred in by the Circuit Court of Appeals. In its opinion, the Circuit Court of Appeals said:

> "They" (the facts) "are supported by substantial evidence" (R. 179).

At another point in its opinion is the following language with reference to the facts:

> "And we think the finding is sound and fully established by substantial evidence" (R. 179).

And again, in its opinion, the court uses the following language:

> "The facts are supported by substantial evidence, and we think the conclusion is sound" (R. 180).

Not only will the Supreme Court decline to grant a writ of certiorari merely to review the evidence or inferences drawn therefrom, but when the decision rests on concurrent findings of fact they are not to be disturbed unless plainly without support. Under a well established rule

this court accepts the findings in which two courts concur, unless clear error is shown.

Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548;
General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175;
In re Tax Service Association of Illinois, 305 U. S. 160.

THE THIRD PROPOSITION under "Questions Presented" is uncertain and ambiguous. The Petitioner probably is questioning the right of the Respondent to set off against the alleged preferential payments an amount equal to the total, including the item of $3,304.36, which was the amount of the overdraft at the beginning of the four-month period immediately preceding the bankruptcy. The courts found that the deposits were not made by the bankrupt or received by the Respondent for the purpose of building up such deposits for the benefit of the Respondent or to enable it to exercise its right of set-off, or with a view to such use (R. 154 and R. 176). With the facts thus established and supported by substantial evidence, under the law involved the Respondent is clearly entitled to the set-off under the provisions of **Section 68 (a)** and **Section 68 (b)** of the **Bankruptcy Act** and under the authority of the following cases:

New York County National Bank v. Massey, 192 U. S. 138;
Steedley v. Boylston National Bank, 229 U. S. 523;
Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co., 229 U. S. 435.

(Again, the attention of the court is respectfully directed to the fact that this case is controlled by the provisions of the Bankruptcy Act prior to the amendments of June 22, 1938.)

Just what Petitioner is referring to when he questions the right of set-off against the bankrupt existing in favor of the Respondent bank at the beginning of the four-month period is not clear. The right of set-off exists at all times between a bank and its depositors so long as the deposit is not specially built up for the purpose of a set-off by the bank. If Petitioner is questioning the facts underlying the set-off by the Respondent in this case, then the court is respectfully referred to the preceding portions of this brief discussing this court's attitude towards questions of fact presented in a petition for a writ of certiorari.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

UNDER THIS HEADING, THE PETITIONER FIRST CONTENDS that the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case is in conflict with the United States Circuit Court of Appeals for the Fourth Circuit in the case of **Bank of Commerce and Trusts v. Hatcher, 50 Fed. (2d) 719.** The Petitioner fails to state precisely the language claimed to be conflicting or, where the language standing alone is consistent, show that in their necessary effect the cases stand for exactly conflicting rules. **8 Hughes Federal Practice, p. 540.** As a matter of fact, there is no conflict between the language or the holdings in the two cases.

In the Hatcher case, the deposit consisted of a check received under a contract which required the money to be deposited in the bank and paid out only on checks approved by the bank's vice-president. At the time of making the deposit in question, the bankrupt also presented for approval checks drawn on the deposit, which checks the vice-president refused to approve in order that the deposit

might be applied on the indebtedness. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case is in the record. (R. 174-180.) Compare it with the pertinent and appropriate language in the Hatcher case at p. 721, which is as follows:

> "It is perfectly clear that the transaction here involved did not constitute a deposit in regular course of business. The distinguishing characteristic of such a deposit is that it creates a balance in favor of the depositor which is subject to withdrawal at his will. Here the deposit lacked absolutely this characteristic. It was intended by the bankrupt to provide for the payment of certain checks which were presented for approval, not to create a balance in the bank subject to its control. It was received by the bank, not for the purpose of creating such balance, but for the purpose of being applied on the pre-existing indebtedness of the bankrupt. The balance created was at no time subject to the withdrawal of the bankrupt and was promptly applied by the bank upon the bankrupt's indebtedness. The net result of what took place was the transfer of the certified check of Luck & Sons to the bank as payment upon pre-existing indebtedness, not the creation of a deposit balance subject to withdrawal by the bankrupt in ordinary course."

The decision in the instant case is not in conflict with any one of the decisions in the cases cited by the Petitioner on page 13 of his brief. A short quotation from each will be sufficient to demonstrate this statement:

In **Rupp v. Commerce Guardian Trust & Savings Bank, 32 F. (2d) 234 (C. C. A. 6th)**, the court at page 235 says:

> "They were not accepted by appellee for deposit, but were taken by it—regardless of the purpose of the bankrupt—with the intention of applying them to the indebtedness of the bankrupt."

In **Frankfort Trust Co. v. Comber, 68 F. (2d) 471 (C. C. A. 3d)**, at page 472 the court says:

> ". . . On this evidence the verdict established that the bank had reasonable cause to believe that Baseman was insolvent and in taking Baseman's money through the channel of the corporation's deposit well within four months of bankruptcy it accepted or effected a preference."

In **Callaway v. West Balm Beach Atlantic National Bank, 69 F. (2d) 224 (C. C. A. 6th)**, on page 224 the court says:

> "We think it make no case of a deposit and a set-off in the usual course of business, but one of preferential payment."

In **Twentieth Street Bank v. Gilmore, 71 F. (2d) 594 (C. C. A. 4th)**, at page 595 the court says:

> ". . . . It appears that the funds constituting the deposit balance were unquestionably deposited while a committee of creditors was operating the business of the milling company, and that such deposits were not made in the ordinary course of business by the corporation, but under such circumstances as to constitute them a fund for the benefit of its creditors and to estop the bank from asserting against them any banker's lien or right of set-off."

In **First Wisconsin National Bank of Milwaukee v. Charness, 73 F. (2d) 730 (C. C. A. 7th)**, the court, in sustaining the finding and judgment of the District Court, at page 731 says:

> "The court held that the deposits of the proceeds of this special sale were not made in the ordinary course of business, but were the proceeds of a sale conducted by the company with the co-operation of the bank, and the payments made from a built up account."

THE SECOND REASON relied on for allowance of the writ asserts that the Circuit Court of Appeals in the instant case rendered an opinion and entered a judgment respecting recoverable preferences in bankruptcy in conflict with the general weight of authority. Respondent submits this reason is not within the meaning, purview or contemplation of **Rule 38, paragraph 5 (b), 28 U. S. C. A. following Section 354**, pertaining to the granting of a review on writ of certiorari to a Circuit Court of Appeals.

The rule by which this court is guided in exercising its power to grant writs of certiorari is announced in **Magnum Import Co. v. Coty, 262 U. S. 159**, in the following language:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The opinion and judgment of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case is in accord with the previous decisions of this court and of the Circuit Courts of Appeal wherein similar questions of fact were involved and similar points of law decided. Some of the cases in point have been previously cited in this brief. A few additional authorities are those referred to in the opinion of the Circuit Court of Appeals in the instant case (R. 180).

THE THIRD AND LAST of the "Reasons Relied on for Allowance of the Writ" asserts that the banking practice followed in this case and approved by the Circuit Court

of Appeals in its opinion and judgment raises questions of great public interest.

It is respectfully submitted this reason is not within the meaning, purview or intent of **Rule 38, paragraph 5 (b), 28 U. S. C. A.**, following Section 354. Furthermore, this is the assertion of an abstract proposition without showing its connection with or relevancy to any of the matters involved in or growing out of the opinion or decision in the instant case. Such banking practice as may be involved is entirely of a private nature and not of public concern. If the banking practices in contemplation of the Petitioner involve any statutes or laws or any legal principles, they are not in issue in the instant case.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for the writ of certiorari should be denied.

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